

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KYLE ANDREW EVERHART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. C16-5405 BHS
CR13-5512BHS

ORDER DENYING MOTION
FOR DEFAULT AND
REQUESTING ADDITIONAL
BRIEFING

This matter comes before the Court on Kyle Andrew Everhart's ("Petitioner") motion under 28 U.S.C. § 2255 (Dkt. 1), his motion for default (Dkt. 8), and his motion for leave to amend and appointment of counsel (Dkt. 11). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby (1) denies the motion for default and (2) requests additional briefing on Petitioner's motion under 28 U.S.C. § 2255.

I. PROCEDURAL HISTORY

On September 24, 2014, a jury found Petitioner guilty of Possession of Methamphetamine with Intent to Distribute under 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 18 U.S.C. § 2. Cause No. CR13-5512, Dkt. 120. On December 15, 2014, the Court

1 entered judgment in Petitioner's case. *Id.*, Dkt. 139. On December 17, 2014, Petitioner
2 gave notice of appeal. *Id.*, Dkt. 140. On February 11, 2016, the Court of Appeals for the
3 Ninth Circuit affirmed Petitioner's conviction. *Id.*, Dkts. 216, 218.

4 On May 26, 2016, Petitioner filed a petition under § 2255, presently before the
5 Court. Dkt. 1. On May 31, 2016, the Court entered an order requiring the Government to
6 answer. Dkt. 3. On June 14, 2016, the Government requested an extension to answer.
7 Dkt. 5. The Court granted the Government's request, extending the response deadline to
8 July 8, 2016. Dkt. 6. On July 8, 2016, the Government responded. Dkt. 7.

9 On July 18, 2016, Petitioner filed a motion for judgment, arguing the Government
10 failed to timely respond. Dkt. 8. On July 20, 2016, the Government responded to that
11 motion. Dkt. 9.

12 On August 1, 2016, Petitioner filed a reply to the Government's response to his §
13 2255 petition. Dkt. 10. On August 9, 2016, he moved for appointment of counsel and for
14 leave to amend his petition. Dkt. 11. On August 16, 2016, the Government responded to
15 Petitioner's motion for counsel and leave to amend. Dkt. 12

16 II. DISCUSSION

17 A. Motion for Default

18 Petitioner has filed a motion for default, claiming that the Government failed to
19 timely respond to his petition. Dkt. 8. On June 14, 2016, the Government requested an
20 extension to answer. Dkt. 5. The Court granted the Government's request, extending the
21 response deadline to July 8, 2016. Dkt. 6. On July 8, 2016, the Government responded.
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1 Dkt. 7. Because the Government responded within the extended deadline, the Court
2 denies Petitioner's motion for default judgment.

3 **B. Additional Briefing**

4 In his reply, Petitioner argues that he "informed Agent Brady repeatedly that [he]
5 was only willing to only discuss the [Louisiana] murder and nothing else and [Agent
6 Brady] assured [him] that was what the waiver was for." Dkt. 10 at 5 (emphasis added).
7 This argument raises concerns regarding the validity of Petitioner's waiver of his Fifth
8 Amendment rights and timely presentment before a magistrate judge under Federal Rule
9 of Criminal Procedure 5 and the *McNabb-Mallory* rule.

10 Generally, "a suspect's awareness of all the possible subjects of questioning in
11 advance of interrogation is not relevant to determining whether the suspect voluntarily,
12 knowingly, and intelligently waived his Fifth Amendment privilege." *Colorado v. Spring*,
13 479 U.S. 564, 577 (1987). "However, the authorities must 'scrupulously honor' the
14 suspect's right to cut off questioning." *United States v. Soliz*, 129 F.3d 499, 504 (9th Cir.
15 1997), *overruled on other grounds by United States v. Johnson*, 256 F.3d 895 (9th Cir.
16 2001) (quoting *United States v. Lopez-Diaz*, 630 F.2d 661, 664 (9th Cir.1980)). The
17 Ninth Circuit has found that:

18 [A] suspect may selectively waive his right to remain silent in one of two
19 ways. He may either tell the police that he will not discuss certain subjects,
20 or the suspect may . . . inform the police that he is willing to discuss only
21 specific subjects. Both approaches effectuate *Miranda*'s requirement that a
22 suspect in custody have the right to remain silent or, at his discretion, to
limit questioning.

1 *United States v. Soliz*, 129 F.3d 499, 504 (9th Cir. 1997) (internal citations omitted). *See*
2 *also United States v. Ho*, 232 F.3d 897 (9th Cir. 2000); *United States v. Lopez-Diaz*, 630
3 F.2d 661, 664 (9th Cir. 1980); *United States v. Lorenzo*, 570 F.2d 294, 297–98 (9th Cir.
4 1978) (“It is also clear that a suspect may, if he chooses, selectively waive his Fifth
5 Amendment rights by indicating that he will respond to some questions, but not to
6 others.”). *But see United States v. Farley*, 607 F.3d 1294, 1329–30 (11th Cir. 2010).

7 The Ninth Circuit has also recognized

8 a critical distinction between . . . an inquiry for the limited purpose of
9 clarifying whether the defendant is invoking his right to remain silent or has
10 changed his mind regarding an earlier assertion of the right and, on the
other hand, questioning aimed at eliciting incriminating statements
concerning the very subject on which the defendant has invoked his right.

11 *United States v. Lopez-Diaz*, 630 F.2d 661, 665 (9th Cir. 1980).

12 Petitioner’s argument implicates the Ninth Circuit’s *Lopez-Diaz* and *Soliz* line of
13 decisions. He has asserted that his waiver was selective and that Agent Brady’s questions,
14 which resulted in Petitioner’s confession, violated Petitioner’s right to limit the scope of
15 his waiver. Factually, Petitioner’s argument is somewhat strengthened by the Court’s
16 own observation that Petitioner “told [the officer transporting him to Pierce County Jail]
17 that he wanted to talk about the homicide investigation in Louisiana.” Dkt. 7-1 at 38.

18 The Court finds that the Government should be afforded an opportunity to respond
19 to Petitioner’s argument. Accordingly, the Court requests additional briefing on the
20 following issues:
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